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TN REGULATORY AUTHORITY  
February 28, 2003  
DOCKET ROOM

VIA HAND DELIVERY

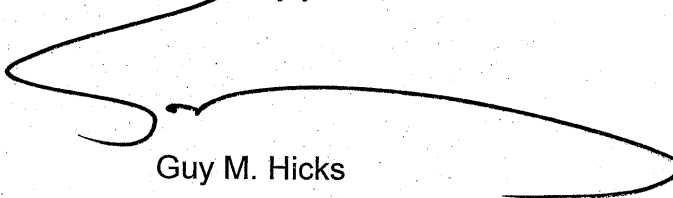
Hon. Sara Kyle, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

RE: *Petition to Suspend BellSouth's "Welcoming Reward" Tariff and  
Open a Contested Case Proceeding.*  
Docket No. 03-00060

Dear Chairman Kyle;

Enclosed are the original and 14 copies of the Reply of BellSouth Telecommunications, Inc. to the Comments Regarding Substitute Tariff. Copies of the enclosed are being provided to counsel for the four CLECs and the Consumer Advocate Division.

Very truly yours,



Guy M. Hicks

cc by fax: Henry Walker, Esq.; Boulton, Cummings, et al.  
Joe Shirley, Esq.; Consumer Advocate Division

GMH:kcd

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

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In Re: *Petition to Suspend BellSouth "Welcoming Reward" Tariff and Open a Contested Case Proceeding*

TN REGULATORY AUTHORITY  
DOCKET ROOM

Docket No. 03-00060

**REPLY OF BELL SOUTH TELECOMMUNICATIONS, INC. TO COMMENTS  
REGARDING SUBSTITUTE TARIFF**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its reply to the *Response of CLEC Coalition to Amended Tariff*, and the *Attorney General's Response to Proposal from BellSouth*.<sup>1</sup> As explained below, the Tennessee Regulatory Authority (the "TRA" or the "Authority") should approve BellSouth's substitute tariff during its next scheduled Agenda Conference on March 3, 2003. The Authority should also exercise its discretion and decline to convene a contested case proceeding.

BellSouth's substitute tariff has been filed as a compromise to address the concerns expressed during the February 18, 2003 Agenda Conference. Those concerns focused on the applicable discount for CLEC resale of the *Welcoming Reward* Program. The questions arose in light of a dispute over whether BellSouth's *Welcoming Reward* tariff constituted a "short term" or "long-term"

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<sup>1</sup> The "CLEC Coalition" includes only four CLECs - Access Integrated Networks, Inc., Cinergy Communications Company, Xspedious Communications Corporation, and AT&T Communications of the South Central States, Inc. Notably, while raising arguments regarding resale, they do no more than 1% of their business in Tennessee using resale. While the Consumer Advocate Division refers to itself throughout its *Response* as "the Attorney General", it is BellSouth's understanding that the *Response* is being submitted by the Consumer Advocate and Protection Division, as opposed to either the Attorney General himself or the Attorney General's office acting in its capacity as legal advisor.

promotion. The substitute tariff has been modified such that it is clearly a long-term promotion for purposes of resale, and BellSouth will make the promotion, including the \$100 bill credit, available at the wholesale discount to reselling CLECs.

This resale mechanism is precisely what the four CLECs asked for during the February 18, 2003 Agenda Conference. The four CLECs, however, are still not satisfied. Their primary claim is that the substitute tariff discriminates against existing customers. This is the same flawed argument they made during the February 3, 2002, Agenda Conference. They also changed their story on how the wholesale discount should be applied and proffer a new theory that lacks any mathematical merit and would result in a 20%, rather than the TRA-ordered 16%, discount.

As BellSouth has previously pointed out, the four CLECs are simply attempting to insulate both their existing business customers and new business customers from competition and better offers by BellSouth. Obviously, this is not what the General Assembly and the TRA intended when they set Tennessee on the path to a competitive market for telecommunications.

The response filed by the Consumer Advocate Division (the "CAPD") merely lists purported issues and summarizes arguments made in previous CAPD filings. These arguments remain fatally flawed as a matter of law.<sup>2</sup>

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<sup>2</sup> BellSouth filed extensive briefs refuting the CAPD's arguments on January 31, 2003 and February 14, 2003.

**I. THE SUBSTITUTE *WELCOMING REWARD* TARIFF IS NOT UNDULY DISCRIMINATORY**

The four CLECs continue to make the absurd argument that an existing (actual) customer and a new (potential) customer are similarly situated and that BellSouth must therefore offer the *Welcoming Reward* Program to its existing customers. According to the four CLECs, "[For] all relevant purposes, the two customers are identical." The four CLECs opine that BellSouth receives the same revenue from an existing customer purchasing two additional lines as from a new customer purchasing two additional lines and that the "real purpose of the *Welcome Reward* program is not to sell more access lines but to damage the company's competitors." (See page 2 and 3 of Response of CLEC Coalition.)<sup>3</sup>

This transparent attempt to mislead the Authority into suspending a pro-competitive tariff must be rejected. The four CLECs simply do not want to compete against BellSouth's offer. They have no serious claim of any unique damage caused by this promotion. Indeed, they face the same consequence as a result of this tariff that every telephone company faces in a competitive environment like Tennessee's. Every time a customer chooses a new service provider, the former service provider (and every other competing carrier who might have liked to win that business) is "damaged" in the sense that it loses a customer and the revenue from that customer. Obviously, that sort of "damage" is not damage at all.

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<sup>3</sup> Notably, the CLECs attempt to bolster their flawed argument by contending that BellSouth's tariff requires customers to "switch" lines to BellSouth. (See page 2 of Response of CLEC Coalition). Nothing in the tariff restricts a customer from purchasing new lines, obtained from BellSouth pursuant to the promotion while maintaining all of its current level of service with a CLEC. This practice of splitting service between providers is common – and was discussed at length in the Bank and Store case.

Rather, it is merely an ordinary feature of a competitive market. Any such "damage" is no basis for denying a pro-customer promotion.

The FCC has recognized that competing offers of better and lower prices are good for consumers. The FCC has stated that restrictions on Winback activities "may deprive customers of the benefits of a competitive market," explaining that

Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customers business....The ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.<sup>4</sup>

By taking part in the practice of seeking to win new customers with better offers and lower prices, competitors including BellSouth, will inevitably be "damaged" each time they lose a customer to a competitor. Surely the CLECs do not seriously expect that Tennessee could realize the goal of a competitive telecommunications market without a CLEC ever losing a customer or potential customer to BellSouth.

The purpose of BellSouth's *Welcoming Reward* Program is not to damage its competitors, but to attract new customers. This is exactly the same thing that the CLECs intend when they offer promotions – to attract new customers. That is the nature of competition. It would indeed be a strange turn of events if "competition"

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<sup>4</sup> *Welcoming Reward* is available to new business customers, not just former CLEC customers, and is therefore not a winback. The FCC has stated that winbacks themselves are appropriate responses to competition. See *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information; Implementation of the Non-Accounting safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket No. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, ¶67 (1999) (the CPNI Reconsideration Order).

were defined only as CLECs taking BellSouth customers. Consistent with the FCC's Order, logic dictates that competition has to be a two-way street.

The four CLEC's cite no case law whatsoever in support of their discrimination argument. The four CLECs and the CAPD fail to even address, much less rebut, the Tennessee Supreme Court opinion BellSouth has consistently cited in its briefs.

Tennessee law does not prohibit a public utility from offering different rates – it only prohibits a utility from offering different rates to similarly situated customers. In *Southern RY. Co. v. Pentecost*, 330 S.W.2d 321, 325 (Tenn. 1969), the Tennessee Supreme Court held that a railroad did not engage in undue discrimination by charging some customers \$18 per car while charging a nearby customer \$33 per car. The Supreme Court explained that carriers

are only bound to give the same terms to all persons alike under the same conditions and circumstances, and *any fact that produces an inequality of condition and a change of circumstances justifies an inequality of charge.*

With regard to the *Welcoming Reward* program, the "inequality of condition" or a "change of circumstances" is dramatic: new (potential) customers are differently situated than existing (actual) customers. Any business person would wholeheartedly agree that there is a mountain of difference between the customer she has and the customer she does not have. All competitive markets turn on the efforts to attract those potential customers. Additionally, a new customer, as opposed to an existing customer merely adding lines, provides a carrier with a new customer relationship and a new opportunity to sell that customer additional

services that the existing customer may already have. The importance to any business of expanding its customer base – as opposed to only selling additional services to existing customers - is obvious. At some point existing customers have chosen all the services they may want or need, while a new customer has higher potential for purchasing additional services. These concepts are fundamental to any business in a competitive market, and, accordingly, the contention that existing and new customers are not distinguishable is baseless.

Consequently, existing customers and non-customers (potential customers) cannot be said to be similarly situated for purposes of telecommunications service in Tennessee.

In the face of competition, BellSouth must make greater efforts to obtain new customers than to retain existing ones. Moreover, those efforts result in tangible savings and benefits to customers. As a matter of state law, therefore, existing and new customers are not similarly situated, and BellSouth's tariff is not unduly discriminatory. As a matter of TRA policy, those kinds of promotional efforts deliver discounts to customers and should be *encouraged* – not discouraged.

If adopted, the four CLECs' discrimination argument would have dramatic anti-competitive effects in that it would provide an overwhelming *disincentive* for BellSouth to offer lower prices to attract new customers through promotional offerings, a result the FCC has specifically said is undesirable.<sup>5</sup>

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<sup>5</sup> See p. 3, above. (The FCC has noted that restrictions on winback activities "may deprive customers of the benefits of a competitive market ....").

Moreover, the discrimination statutes on which the four CLECs and CAPD rely apply equally to CLECs. The Attorney General and CAPD acknowledged this in the CSA Rulemaking proceeding. (See, for example, Transcript of August 6, 2002, Authority Conference, page 20, line 19). This means that if the four CLECs' draconian view of "similarly situated" is accepted by the TRA, CLEC promotions for new customers must also be scrutinized and prohibited by the TRA.

The four CLECs' attempt to salvage their discrimination argument by referring to testimony BellSouth filed in its 271 proceeding regarding Contract Service Agreements ("CSAs") and claiming that such testimony is inconsistent with BellSouth's position with respect to its *Welcoming Reward* tariff. This argument is totally without merit. It is quoted out of context, and it does not support the CLECs' argument.

Mr. Ruscilli, of BellSouth, stated in the 271 case that CSAs will be made available to similarly situated customers. He defined "similarly situated" in this context as

End users are similarly situated if their quantity of use and length of contract, and the rates, terms and conditions of services, are the same.<sup>6</sup>

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<sup>6</sup> Direct testimony of John Ruscilli in Docket 97-000309, filed April 26, 2003 at page 108. For the first time, in their latest filing, the CLEC coalition admits that its earlier brief inaccurately cited the Tennessee SGAT. Now, the CLECs attempt to gloss over that error by suggesting that the quote was correct – but it was actually just in another place – not the SGAT, but instead the Ruscilli 271 CSA testimony. This is misleading. The original quote did not include the reference to the requirement that customers have the same "rates, terms, and conditions of service." Consequently, the Ruscilli testimony is materially different language than that the CLECs wrongly attributed to BellSouth's SGAT in their previous filing. As is explained above, these differences undermine the CLEC argument. The fact is that the earlier quote was wrong and the substituted quote is not "similar" and does not support their argument.



Obviously, an existing customer and a prospective customer (a non-customer) are not similarly situated under this definition. BellSouth receives revenue from an existing customer, but not from a prospective one. In the business world, that alone is a compelling difference. Additionally, the existing customer has a contract and therefore a "length of contract", while the prospective customer has no contract with BellSouth. Similarly, the existing customer has a "quantity of use", and the non-customer has no "use" with BellSouth. Nor can it be reasonably argued that an existing customer and a prospective customer have the same rates, terms and conditions with BellSouth. Unlike the existing customer, the non-customer has no rates, terms and conditions. Contrary to the claim by the four CLECs, therefore, there is nothing inconsistent between Mr. Ruscilli's testimony and Bellsouth's argument in this proceeding.

Perhaps more importantly, the Ruscilli testimony was offered to explain the situations in which individualized CSAs could be offered for resale by CLECs to other customers. Mr. Ruscilli's testimony was not offered in the context of general promotions. Obviously, there are situations in which "similar situation" for purposes of the discrimination analysis for a promotion would include other factors. For example, the TRA has long permitted promotions available in particular rate groups or wire centers.

## **II. THE SUBSTITUTE *WELCOMING REWARD* TARIFF IS AVAILABLE FOR RESALE IN ACCORDANCE WITH FCC RULES AND TRA ORDERS**

At the eleventh hour and after getting precisely what they asked for during the February 18, 2003 Agenda Conference, the four CLECs have now come up

with a new theory for applying the wholesale discount. The new theory is mathematically flawed.

The CAPD, on the other hand, forthrightly states in its Response that BellSouth's substitute tariff "renders moot issue no. 1 regarding resale at wholesale discount rates." Also, "[I]f the TRA accepts BellSouth's proposed tariff, these issues will be mooted because it clearly provides that the promotional discounts offered therein are available for resale." (See pages 3 and 7 of the CAPD Response.) This is not surprising given the modifications BellSouth made to the tariff.

As stated above, in response to concerns raised during the February 18, 2003 Agenda Conference, BellSouth has proposed a substitute tariff that is clearly a long-term promotion for purposes of resale. BellSouth has agreed to make the promotion, including the \$100 bill credit, available at the wholesale discount to reselling CLECs.

The substitute tariff states clearly that "[B]eginning March 3, 2003 this program as well as the \$100 reward described below, is available for the resale at the wholesale discount...". (See BellSouth's letter to the Authority dated February 21, 2003 and Section A13.90A.4. of the proposed tariff.) Specifically, BellSouth will apply the 16% wholesale discount ordered by the Authority to the substitute tariff in the following manner:

First, the promotional rate (which counsel for the CLECs described as the "effective rate" at the February 18 Agenda Conference) is determined by multiplying the 1FB rate by 12 months and subtracting the \$100 bill credit:

$$\begin{aligned} & (1\text{FB rate for Rate Group } \%) \times 12 \text{ months minus } \$100 \text{ bill credit} = \$376.40 \\ & \text{or} \\ & \$39.70 \times 12 - \$100 = \$376.40 \end{aligned}$$

Next, the 16% wholesale discount is applied to that promotional rate of \$376.40 to calculate the CLEC resale rate:

$$\$376.40 \times 84\% = \$316.18$$

Thus, the CLEC is entitled to resell the promotion at a 16% discount from the promotional rate of \$376.40, or \$316.18 annually.

BellSouth will operationalize this by providing the reselling CLEC a bill credit to reduce the ordinary wholesale annual resale rate of \$400.18 for a business line to the wholesale promotional rate of \$316.18 in the following manner:

Wholesale tariff rate x 12 month	
or	
\$39.70 X 84% X 12 =	\$400.18
less the "effective" CLEC annual promotional resale rate	-\$316.18
	<hr/>
CLEC Bill Credit	\$ 84.00

This bill credit, paid at the same time an end user would receive the credit, reduces the CLEC's resale rate to the promotional rate less 16%. (See Attachment A.)

The calculation described above is *precisely* the calculation and result the four CLECs asked for during the February 18, 2003 Agenda Conference. In

response to BellSouth's question, counsel for the four CLECs explained the requested application of the wholesale discount as follows:

"You would take the effective retail rate which is the B1 for 12 months, less the 100 dollar credit" and "then you would take the 16% wholesale discount off of that".<sup>7</sup>

As shown above, BellSouth is offering, as a compromise, precisely what the four CLECs requested – namely a 16% discount off of the promotional (or "effective") rate. The four CLECs now demand more than the 16% discount. If the CLECs were given a bill credit of \$100, as they demand, rather than the \$84 credit described above, then they would be getting a 20% discount off of the "effective rate."

Indeed, under the four CLECs' latest theory, the 16% wholesale discount ordered by the Authority is dispensed with entirely and replaced with a 20% discount. BellSouth's application of the wholesale discount to its proposed long-term promotion is fully consistent with applicable law and should be approved.

Finally, the CAPD argues that the promotion should be prohibited because it would restrict resellers from reselling the promotional tariff to BellSouth customers (apparently construing the promotion to be available on resale only to customers who are "new" to BellSouth). Relying on that assumption, the CAPD argues that the resale of the program is unduly restrictive in that the reselling CLEC markets its effort toward obtaining existing BellSouth customers and resale of the program would restrict its ability to use the promotion for this purpose. This argument completely misses the mark, because there is no such restriction on resale. Rather,

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<sup>7</sup> See Transcript of February 18, 2003 Agenda Conference at page 35.

reselling CLECs may offer the promotion to any "new" customer (that is, a customer new to that CLEC). Thus, the CLEC can use the promotion, through resale, to compete with BellSouth and to lure away one of BellSouth's existing customers. This position is consistent with BellSouth's interpretation of the resale restrictions for other BellSouth promotions. The fact that either the CAPD or reselling CLECs were unaware of this interpretation is one more example demonstrating that resale is not the real issue. If these CLECs were actually resellers, they would be well aware that promotions such as these targeted to new customers (and of the "new" customers from the CLECs' perspective) can be resold by a reselling CLEC and targeted to existing BellSouth customers. Clearly the reason these parties are unaware of this fact is because none of them engage in resale. In short, these resale-oriented questions are not being posed to enable resale. Rather, they are presented as a distraction in an effort to prohibit BellSouth from offering this tariff promotion.

### **CONCLUSION**

In the spirit of compromise and to address concerns raised during the February 18, 2003 Agenda Conference, BellSouth has altered its tariff such that it is clearly a long-term promotion for purposes of resale. BellSouth will make the promotion, including the \$100 bill credit, available at the wholesale discount to reselling CLECs. As demonstrated above, the *Welcoming Reward* tariff is not unduly discriminatory or anticompetitive. It is pro-competitive and demonstrates that the Authority's pro-competitive policies are working and bringing lower prices and better offers to Tennessee businesses.

BellSouth respectfully requests that the Authority approve the substitute tariff on March 3, 2002. Given that the CAPD and the CLECs have raised no factual issues and no legitimate legal issues, BellSouth also requests that the TRA exercise its discretion to decline to convene a contested case proceeding. In the alternative, if the Authority decides to convene a contested case proceeding, BellSouth requests that the Authority allow the substitute tariff to go into effect. This will encourage competitors to continue to "out bid" each other, as the FCC envisioned, during the pendency of any contested case proceeding. After all, that bidding process – in which carriers compete to win customers with attractive offers and discounts – is exactly what competition is all about – and that is exactly what Tennessee customers expect.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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## **ATTACHMENT A**

**Transcript Reference - Attorney Walker**

Page 35, line 10: "you would take the effective retail rate, which is the B1 for 12 months, less the 100 dollar credit"

Page 35, lines 12 - 13: "and then you would take the 16% wholesale discount off of that"

"Effective" CLEC annual resale rate:

**Operationally-Feasible Equivalent Calculation**

BellSouth has developed a procedure to provide the same dollar value to reselling CLECs by applying the credit to the CLEC bill at the same time that BellSouth's end-user would receive the credit under the Welcoming Reward program. BellSouth calculates the CLEC credit as follows:

(1FB rate for RG 5) x 12months -\$100 reward = \$376.40  
[\$39.70 x 12 -\$100]

"effective rate" - 16% wholesale discount = \$316.18  
[\$376.40 \* 84%]

\$316.18

wholesale tariff rate x 12 months \$400.18  
[\$39.70 x 84% x 12]  
less the "effective" CLEC annual resale rate -\$316.18  
CLEC bill credit \$84.00

Application of the \$84.00 CLEC bill credit ensures that reselling CLECs are able to resell at the annual "effective rate", as described by Mr. Walker, of \$316.18.